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SUPREME COURT, U.S.

NO. 81-6536

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

JAMES DAVID AUTRY,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WAS PETITIONER'S VOLUNTARY ORAL CONFESSION, MADE NOT AS A RESULT OF CUSTODIAL INTERROGATION, ADMISSIBLE UNDER THE FIFTH AMENDMENT?

II. IS THE EVIDENCE SUFFICIENT TO PROVE PETITIONER COMITTED A CAPITAL OFFENSE?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition:

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, delivered on January 20, 1982, is reported at 626 S.W.2d 758 (Tex.Crim.App. 1982) and is attached to the petition as Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner bases his claims upon the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. Also involved is V.T.C.A. Penal Code, §19.03.

STATEMENT OF FACTS

Petitioner was indicted on August 24, 1980, in Jefferson County, Texas, for the capital murder of Shirley Drouet, a convenience store clerk, while in the course of committing and attempting to commit robbery (R. 2). 1/ Trial began on September 23, 1980, and on October 9, 1980, a jury found Petitioner guilty of the capital offense. After a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Article 37.071(b), V.A.C.C.P., and accordingly, punishment was assessed at death (R. 7-12). Petitioner's conviction was affirmed by the Court of Criminal Appeals on January 20, 1982, and a timely filed motion for rehearing was denied on February 10, 1982.

SUMMARY OF ARGUMENT

There are no special and important reasons to review this case. Petitioner's oral confession to the capital offense, made from the police station during a telephone call to his mother was admissible over his Fifth Amendment objections, as it was not obtained as a result of custodial interrogation. There was no causal connection between Petitioner's written statement made over six hours earlier, later ruled inadmissible, and his statements to his mother overheard in the police station.

The evidence clearly is sufficient to show that Petitioner committed a murder in the course of attempting to commit a robbery. In addition to his own admissions, other evidence was introduced by the state to prove the murder occurred as a result of the abortive robbery.

1/ "R." will refer to the statement of facts from Petitioner's trial.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reasons in this case and none exist. Contrary to Petitioner's contentions, this case involves no novel questions of law, but rather the application of well settled precedent to the particular facts here involved.

II.

THE ADMISSION OF PETITIONER'S ORAL CONFESSION TO THE CAPITAL CRIME WAS PERMISSIBLE UNDER THE FIFTH AMENDMENT AS IT WAS NOT THE RESULT OF CUSTODIAL INTERROGATION.

The record reflects that Petitioner executed a full written confession to the capital crime, wherein he admitted that he shot the convenience store attendant, Mrs. Drouet, and two other witnesses (R. 2537). A pretrial hearing was held on the admissibility of this confession, see Jackson v. Denno, 378 U.S. 368 (1964), and the trial court suppressed the confession, stating:

> ... the evidence shows that he [Petitioner] did indicate that he wished to stop the interrogation. And the Court further finds that this indication by the Defendant was not scrupulously honored by the law enforcement officers. 2/

(R. 470).

Other evidence showed that Petitioner was arrested at his home on April 21, 1980, at approximately 1:45 a.m. He was advised of his Miranda 3/ rights several times, and executed the written confession at approximately 6:30 a.m. the next day. Thereafter, he was returned to his cell (R. 236-470).

2/ The basis for the court's ruling was a handwritten statement wherein Petitioner made certain admissions and then stated that that was all he wanted to say. The typewritten statement was executed subsequent to that handwritten statement.

3/ Miranda v. Arizona, 384 U.S. 436 (1966).

The following afternoon, at approximately 1:00 p.m., Petitioner requested the use of a telephone in order to call his mother. He was brought into the booking office of the police station, where the telephone number was dialed for him. A police officer not involved with the instant offense, John Anderson, was in the booking office in order to transfer another prisoner. At that time, he overheard Petitioner state to the other party on the telephone that he had gone into the convenience store to rob it, and had started shooting, but that he would "get out of it." (R. 306-312, 2091). This oral statement was admitted into evidence at Petitioner's trial.

Petitioner's contention that his Fifth Amendment rights were violated by the introduction of this statement is meritless. In Rhode Island v. Innis, 446 U.S. 291 (1980), this Court reiterated that volunteered statements, not obtained as a result of custodial interrogation, are not barred by the Fifth Amendment, and their admissibility is not affected by the holding of Miranda. 446 U.S. at 299; see also, Miranda v. Arizona, supra, at 478. Since clearly the statements made by Petitioner on the telephone to his mother were voluntary and not made in response to custodial interrogation, their admission did not violate the Fifth Amendment.

Petitioner urges, however, that the statements were "tainted" as a result of his previous written confession, which was obtained after his right to cease interrogation was not "scrupulously honored." 4/ See, Brown v. Illinois, 422 U.S. 590 (1975). The court below correctly found that:

> There was no causal relationship between the admission and the written statement excluded by the court.

626 S.W.2d at 765. The record reflects that Petitioner's request to make a telephone call to his mother was made in the booking office of the police station some six and one half hours after

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4/ It should be noted that Petitioner does not now, nor did he in the court below, claim that his arrest was unlawful.

interrogation completely ceased, after he had been returned to his cell and slept, and after the officers had ceased discussing the case with him. As was stated in the concurring opinion in the court below:

> [W]hatever "psychological and practical disadvantages of having confessed" earlier lingered on as he talked with his mother, the conditions under which the confession was made no longer obtained.

626 S.W.2d at 766-767. Since Petitioner's allegations are supported neither in law or fact, this Court should decline to review this ground.

III.

THERE IS AMPLE EVIDENCE TO SUSTAIN PETITIONER'S CONVICTION FOR CAPITAL MURDER.

Petitioner contends that the evidence is insufficient to sustain his conviction for murder in the course of robbery pursuant to V.T.C.A. Penal Code, §19.03(a)(2), urging that the evidence only shows that he entered the convenience store with the "intent" to rob the attendant, but that he was not in the "commission" of the robbery when he murdered the attendant. 5/ The record does not support this allegation.

When this challenge to the sufficiency of the evidence was raised below, the state court held:

> The phrase "in the course of committing or attempting to commit ..." as used in Sec. 19.03(a)(2), supra, is not defined in the Penal Code. Section 29.01(1) of the code, however, does define "In the course of committing theft." That phrase is given the definition of "conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft." We similarly construe

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5/ Sec. 19.03(a)(2), supra, provides:

> A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:
>
> • • •
>
> (2) the person intentionally commits the murder in the course of committing or attempting to commit ... robbery ...

(Emphasis added).

> the phrase of Sec. 19.03(a)(2) to mean conduct occurring in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of the offense, i.e., in this case, of robbery. ...

626 S.W.2d at 762, quoting Riles v. State, 595 S.W.2d 858, 862 (Tex.Crim.App. 1980). The court below found the evidence sufficient to show that Petitioner, while armed with a handgun, entered the convenience store with the intent to commit a robbery, and that following such entry, the store clerk was murdered with a gunshot to the head. A short time after the murder, Petitioner was in possession of the murder weapon, and he subsequently made admissible oral admissions that he shot the victim during an abortive robbery attempt. 626 S.W.2d 762, 763. Thus, the evidence clearly is sufficient to sustain the capital conviction. This Court should decline to review this ground.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that the petition for certiorari be denied.

Respectfully submitted,

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